



NTSB Order No.  
EM-13

UNITED STATES OF AMERICA  
NATIONAL TRANSPORTATION SAFETY BOARD  
WASHINGTON, D. C.

Adopted by the National Transportation Safety Board  
at its office in Washington, D. C.  
on the 12th day of August, 1970.

CHESTER R. BENDER, Commandant,<sup>1</sup> United States Coast Guard,

vs.

CELSO A. GUERRERO

Docket ME-13

OPINION AND ORDER

The appellant, Celso A. Guerrero, employed as a bedroom steward aboard the SS SANTA MAGDALENA, has appealed to this Board from the decision of the Commandant affirming the revocation of his merchant mariner's document (No. Z-505225) and all other seaman's documents, for misconduct aboard ship.<sup>2</sup> The decision of the commandant, dated May 1, 1970, followed appellant's appeal to him (Appeal No. 1788) from the initial decision of Coast Guard Examiner Walter E. Lawlor, entered January 12, 1970, after a full evidentiary hearing.<sup>3</sup> Throughout the proceedings herein, appellant has been represented by counsel.

The examiner found that appellant's misconduct had been proved by evidence "of the required weight and quality," and that on April 12, 1969, while the SANTA MAGDALENA was at sea, appellant had wrongfully molested a 12-year-old female passenger, Donna Lee

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<sup>1</sup>By Order No. EM-10, dated June 24, 1970, the name of the new Commandant of the U.S. Coast Guard, Admiral Chester R. Bender, is substituted in place of that of Admiral Willard J. Smith, his immediate predecessor, in all enforcement proceedings involving the U.S. Coast Guard pending before the Board.

<sup>2</sup>Appeals to this board from decisions of the Commandant sustaining orders of revocation of seaman's documents are authorized under 49 U.S.C. 1654(b)(2), and are governed by the Board's rules of procedure set forth in 14 CFR Part 425.

<sup>3</sup>Copies of the decisions of the Commandant and the examiner are attached hereto as Exhibits A and B, respectively.

Joiner, after inviting her to join him in an unused passenger stateroom, by requesting her to kiss him and by placing his hands on her breast and private parts. These findings encompassed three specifications underlying the charge.<sup>4</sup>

The girl, traveling with her family, boarded the vessel at Newark, New Jersey, bound for Guayaquil, Ecuador. It is undisputed that she occupied Cabin 129 with her older sister, and that appellant was one of two stewards assigned to her passenger section during the whole voyage until April 12, when his misconduct was reported to shipboard authorities. A logbook entry, presented in evidence without objection, showed that the girl's father had made a complaint against the appellant at 2010 (8:10 p.m.) on that date, whereupon the master had removed appellant from the passenger room section until the girl's family had disembarked at Guayaquil.

In addition to the logbook entry, the Coast Guard's case was based on the sworn testimony of the complaining witness and her parents, taken by deposition in Guayaquil, upon written interrogatories propounded by the American Consul in Guayaquil. Counsel for appellant was present at the depositions and cross-examined each witness. On the basis of their testimony, he contended that the examiner was required to dismiss all charges against appellant. He offered no rebuttal evidence on appellant's behalf.

The examiner found that a prima facie case was established by the direct evidence of appellant's offenses given by the complaining witness, coupled with the testimony of her parents and evidence of the ship's log that there was a "fresh complaint" made to shipboard authorities, resulting in official action taken against appellant aboard the SANTA MAGDALENA. He also found that Miss Joiner's identification of appellant was clearly established by the evidence; she was of sound mental state; and a physical examination was neither material nor relevant in view of the nature of the offenses involved. After considering numerous procedural objections advanced by appellant concerning actions of the Coast Guard representatives, the examiner found that they had not materially prejudiced the defense.

Before imposing the sanction of revocation, the examiner considered appellant's prior good record as a member of the U.S. merchant marine. However, he concluded that the "most serious

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<sup>4</sup>A fourth specification, alleging that appellant had also kissed the girl during the encounter, was dismissed by the examiner, since the girl testified he had not done so.

nature" of appellant's misconduct warranted revocation of his seaman's documents under 46 U.S.C. 329(g) and applicable regulations thereunder, namely, 46 CFR section 137.03-5(b)(4) and section 137.20-165, Group F.<sup>5</sup>

On appeal to the commandant, appellant sought reversal of the examiner's decision on the basis of his substantive and procedural arguments at the hearing. The Commandant found ample record support for the examiner's legal and factual findings. He agreed with the examiner's disposition of appellant's procedural objections and affirmed the examiner's order of revocation. The Commandant also rejected appellant's contentions that the examiner was biased; his decision was "written in haste and without consideration"; he misstated the evidence; and the specification alleging that appellant had kissed Miss Joiner "was inserted to inflame and prejudice the mind of the examiner and it accomplished that purpose."

Appellant has filed a brief in support of his appeal to the board, consolidating with it his brief before the Commandant and his memorandum of law to the examiner. In addition to all other contentions relied upon below, he urges that the examiner and the Commandant applied a rule of corroboration that is not supported by case law; further case law requires that Miss Joiner's testimony be

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<sup>5</sup>Section 137.03-5 reads in pertinent part as follows:

Offenses for which revocation of licenses or documents is sought.

- (a) The Coast Guard will initiate administrative action seeking the revocation of licenses, certificates of documents held by persons who have been involved in acts of such serious nature that permitting such persons to sail under their licenses, certificates and documents would be clearly a threat to the safety of life of property.
- (b) These offenses, which are deemed to affect safety of life at sea, the welfare of seaman or the protection of property aboard ship are \* \* \*  
\*(4)Molestation of passengers.\* \* \*."

Section 137.20-165 contains a table of disciplinary sanctions deemed appropriate for various types of seamen's offenses "for the information and guidance of examiners." Included among the seamen's offenses in Group F, which subject first offenders to revocation of their documents, is the offense of "Molestation of passengers."

held unreliable; the girl's testimony falls short of any known legal standard for establishing this type of offense; and, finally the revocation order constitutes "cruel and unusual punishment" when compared with criminal sentences imposed for this type of offense and in view of appellant's good prior record. The Commandant has filed a brief in opposition.<sup>6</sup>

Upon consideration of appellant's brief and upon review of the entire record, we conclude that his misconduct was established by substantial evidence of a probative and reliable character. To the extent not modified herein, we adopt the Commandant's and the examiner's findings as our own. Moreover, we agree that, under the circumstances of this case, appellant's misconduct warranted the sanction here imposed.

Miss Joiner gave clear and convincing testimony. She identified her room steward, whom she knew by his first name, Celso, as the person who had molested her. She testified that, sometime between 5:30 and 6:00 p.m., on the date in question, she had gone to her cabin, when she received a telephone call from Celso, whose voice she recognized, saying that he was in Room 135 and asking her to "come and see it." She met him outside the room and her description of what transpired thereafter is as follows:

"He invited me into the room and told me to look out the window. there was a little couch near the window and I kneeled on it and looked out. He said to me that today we are in Buenaventura and tomorrow or Monday we will be in Guayaquil. He told me he would miss me and asked me to kiss him on the cheek. I thought he just wanted to say goodbye. I guess I shouldn't have done it. I wish I hadn't done it now. He put his arm around my waist and put his hand in between my legs. I took his hand away and said don't do that. He said forgive me and don't tell anyone, please. I didn't understand and I thought he seemed to be such a nice man but he did it again. I said what are you doing and he said nothing. When I got off the couch, he said I am not doing anything. He said let's go out into the hall. I said what were you doing and he said nothing, don't tell anyone. He asked me to give him a little picture to remember me by. I wanted to get away. He said bring it at night so nobody can see. I went back to my room and was thinking about it and was nervous." In response to a further question, Miss Joiner stated that she "guess [ed] he was trying to make me think he

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<sup>6</sup>The Commandant's brief was not timely filed under section 425.20(d) of the Board's rules of procedures. The brief is not accepted, since good cause for the late filing was not shown.

was hugging me in a way and he had his left hand around my waist and had his right hand on my breast and his left hand coming around."

Appellant argues that the probity of Miss Joiner's direct testimony was undermined by her admissions on cross-examination that she was embarrassed and concerned about her parents findings out that she had kissed appellant on the cheek; that she had previously been warned by the steward about disturbing the ship's doctor by playing her flute; that she was also concerned about becoming pregnant because of the steward's actions in Cabin 135; that he had not kissed her; and that the whole incident was confusing. Miss Joiner's confusion at the steward's behavior and worry that she might be pregnant are not significant factors. If anything, they reflect the normal personality and attitudes of a 12-year-old girl. Nor, in our judgment, did warnings by appellant earlier in the voyage, for pranks and childish disturbances, establish a motive to bear false witness against him. Moreover, in her own testimony, she stated that the steward had not kissed her, and, on cross-examination, her testimony did not impeach her direct testimony as to how and by whom she was molested.

The case law cited by appellant<sup>7</sup> concerning rejection of a child's testimony is not applicable here. The testimony of minors as victims of sex offenses may well be rejected as unreliable, on a positive or at least cogent showing that they have "sly and willful" personalities and fear punishment themselves; that they have no capacity to testify; or that they have been coached or coaxed into making the accusations; and there is no circumstantial evidence adduced. The record is devoid of such showing. Additional precedents advanced before the examiner are equally inapposite. We agree with his finding that "there is no evidence that would in any wise indicate that Miss Joiner had invented or concocted her story for any purpose."

The contention that Miss Joiner's story was not corroborated is also misconceived. There was corroboration in her mother's testimony concerning her prompt and full disclosure of the steward's actions and her own in Cabin 135, and by her father's testimony, confirmed by the ship's log, that he had promptly made a complaint to shipboard authorities that his daughter had been molested by appellant. The prompt reporting of an offense to lawfully constituted authority "is one of the most universally

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<sup>7</sup>State of Maine v. Robinson, 139 A. 2d 596 (1958); State v. Ranger, 98 A. 2d 652 (1953); People of the State of New York v. Porcaro, 160 N.E. 2d 488 (1959).

accepted forms of corroboration."<sup>8</sup>

Miss Joiner was not required when aboard ship to identify appellant as her molester, nor was she required to undergo a medical examination by the ship's doctor. However, in view of the undisputed evidence that appellant acquiesced in the master's disciplinary actions and replied "Nothing to say" when the log entry charging him with the molestation was read to him, no need existed for formal confrontation by his accuser. There was full opportunity to test Miss Joiner's knowledge of the identity of her molester during her cross-examination, but no test was attempted by appellant's counsel.<sup>9</sup> We are satisfied with respect to the identification and that neither a physical nor a mental examination was required to assess her credibility as a witness.

Appellant points to one apparent inconsistency between the testimony of Miss Joiner and her mother in answering his questions as to whether they had seen appellant and another steward after the girl had reported appellant's molestation to her mother. Miss Joiner stated that she had pointed appellant out to her mother after supper that evening. Her mother's answer was that she had not seen appellant, but she was asked the question only in relation to a period before supper. The inconsistency is not direct but ambiguous at best. In any event, the materiality of their recollections of seeing appellant before or after supper that evening is not shown and appears remote.

We turn now to appellant's various allegations of procedural error.<sup>10</sup> In regard to the specification alleging that appellant had kissed Miss Joiner, the record shows that the examiner dismissed the specification summarily when moved to do so by appellant's

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<sup>8</sup>See Hughes v. United States (D.C. Cir., 1962) 306 F. 2d 287, 289, and cases cited therein.

<sup>9</sup>See e.g., Board decision in Commandant v. Rodriguez, Order No. EM-3, adopted January 8 1969, wherein the complaining witness, an 11-year-old girl, was required to identify the bedroom steward charged with molesting her from among ten photographs of various individuals submitted to her for inspection on cross-examination.

<sup>10</sup>Appellant's various assertions that the examiner was biased, gave inadequate consideration to the case, and misstated the evidence are wholly unsubstantiated and do not merit our discussion, particularly in view of their disposition in the findings of the Commandant; which we have adopted herein.

counsel.<sup>11</sup> While the insertion of this specification may imply faulty investigation by the Coast Guard representative in the case, we agree with the Commandant that its dismissal for a failure of proof by the examiner also carries the clearest implication that his mind was not prejudiced by the mere preferring of this unfounded charge.

Appellant's contention that the Government denied his counsel access to witnesses on the SANTA MAGDALENA's return to port in Newark, New Jersey, is utterly dispelled by statements of his counsel on the record that it was the steamship company's representative who stopped him from boarding the vessels, advising him that he could speak to appellant ashore.<sup>12</sup> It was also evident, at this point in the hearing, that appellant's counsel did not charge that interference by any Government representative prevented him from boarding.<sup>13</sup> In fact, the Coast Guard representative's counterstatement that he personally requested the company's representative to allow appellant's counsel aboard the vessel but that his request was "turned down," went unrefuted by appellant's counsel.<sup>14</sup> We find no merit in this contention.

Appellant's contention that his counsel was denied the address of the Joiner family in Guayaquil, was properly disposed of by the Commandant. Although the Coast Guard representative had refused to divulge the address at the first session of the hearing on April 30, 1969, the examiner insisted that, in accordance with Coast Guard regulations, the address of the prospective witnesses must be set forth in making an application to take their depositions.<sup>15</sup> At the next session of the hearing on May 16, the Coast Guard representative apparently complied with the examiner's instruction, and appellant's counsel stated he then had the address.<sup>16</sup> He thus had ample notice prior to the depositions in Guayaquil, which were not taken until June 25, 1969. It was not until September 17, 1969

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<sup>11</sup>Tr., pp 70-71.

<sup>12</sup>Tr., p. 27.

<sup>13</sup>Tr., p. 28.

<sup>14</sup>Tr., pp. 28-29.

<sup>15</sup>46 cfr 137.20-140(b) provides: "The application to the examiner [to take testimony by deposition] shall be in writing, setting forth the reasons why it should be taken, the name and address of the witness..." etc.

<sup>16</sup>Tr., pp 34-b, 77.



during the course of his closing argument, that appellant's counsel contended that the address was insufficient, since it was the Joiner's post office box number in Guayaquil. We agree with the Commandant that any objection to the address given was waived at that stage of the hearing. Moreover, appellant's counsel offered nothing to substantiate his claim that since he knew only the Joiner's post office box number, he was prevented from investigating the charges in this case.

We have considered the letter written by a Coast Guard representative to Miss Joiner's parents<sup>17</sup> on April 30, 1969, informing them of the depositions to be taken, advising them that they were not required to discuss the case with appellant's counsel should they be contacted by him, and conveying the idea that appellant would be "emboldened" to repeat similar and "perhaps far more serious" offenses against other young girls if the charges in this case were not proved. While appellant contends that this letter was inflammatory and prejudicial to him, as it was undoubtedly intended to be, this did not automatically deprive him of a fair and impartial hearing. There was no showing that appellant's counsel ever attempted to discuss the case with Miss Joiner or her parents prior to their depositions, and the single instance on the record wherein any witness is asserted to have displayed prejudice is used out of context. This relates to the cross-examination of Miss Joiner's mother in testifying "My first impulse was to kill the man, strangle him and claw him." Taken in context, this statement applied to her feelings toward appellant when she first learned of her daughter's molestation. We hold, therefore, that appellant has failed to show undue prejudice stemming from the Coast Guard's letter to the parents of Miss Joiner.

Finally, we reject appellant's contention that revocation of his seaman's paper is "cruel and unusual punishment." The sanction is commensurate with the gravity of his misconduct, and the continuation of his service aboard vessels of the United States would imperil the safety and welfare of minor passengers.

ACCORDINGLY, IT IS ORDERED THAT:

1. The instant appeal be and it hereby is denied;<sup>18</sup> and

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<sup>17</sup>The contents of the letter are fully set forth in the examiner's initial decision at pages 5 and 6.

<sup>18</sup>Appellant's request for a temporary merchant mariner's document, pending this appeal, was denied by the Commandant and is not appealable to this Board. See Commandant v. Voutsinas,

2. The order of the Commandant affirming the examiner's revocation of appellant's seaman's documents under authority of 46 U.S.C. 239(g) be and it hereby is affirmed.

LAUREL, THAYER, and BURGESS, Members of the board, concurred in the above opinion and order. REED, Chairman, and McADAMS, Member, were absent, not voting.

(SEAL)

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Order EM-1, adopted October 24, 1968.